TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING #96-10

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

Application of the sales and use to tax to charges for advertising, marketing, retail financial service, retail technology, retail training, retail store development, and franchise marketing programs when made in conjunction with and as part of the sale of tangible personal property for resale.

SCOPE

Revenue rulings are statements regarding the substantive application of law and statements of procedures that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

FACTS

Company A is a wholesaler/distributor of grocery, dairy and frozen products. All of Company A's customers are retailers of these consumable products. Company A not only provides the products, but also provides retail support service such as marketing, training, and financial service. In the past, the costs incurred by Company A for product acquisition, product storage, product handling, vendor discounts and various support service items were considered overhead costs and were included in the product selling price.

The invoices showed one line item for the selling price of the product and a separate line item for shipping/delivery charges. Some of their divisions do show a separate line item for fees, which is a fixed percentage of sales ranging from 2 percent to 5 percent.

Company A is currently in the process of implementing a new marketing plan ("Plan"). The intent is to provide its customers the lowest possible cost-of-goods by (1) eliminating from the base selling price costs for advertising, marketing or other retail support service, (2) passing through to the retailers manufacturer discounts and (3) allowing the retailers to choose the specific support services they require.

Under the Plan, all products will be sold F.O.B. Company A's loading dock at its acquisition cost plus a storage charge and a handling charge. If Company A provides the

delivery service, it also will be priced separately. Retailers who need support services may separately purchase the amount and type of services they require.

The retail support services which will be available to the retailers include: advertising, marketing, retail financial service, retail technology, retail training, retail store development, and franchise marketing programs. Under the Plan the invoices will, therefore, be more detailed. Each of the various charges such as acquisition cost, storage charge, handling charge, delivery charge and the various support service costs will be separately stated on the invoice. However, all the separate items billed on the invoice remain components of the selling price of the products. Resale certificates will be obtained from the retail customers.

ISSUE

Whether the separately stated service-related charges on the invoice will be subject to sales or use tax.

RULING

The separately stated service-related charges on the invoice will not be subject to sales or use tax when sold under the facts provided.

ANALYSIS

T.C.A. Section 67-6-201 levies a tax at the rate of six percent (6%) of the sales price of each item or article of tangible personal property when sold at retail in this state.

The term "sale" is generally defined as "any transfer of title or possession." T.C.A. Section 67-6-102(24). The term "sales price" is defined in relevant part by T.C.A.ection 67-6-102(25) to mean "the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property . . .."

Although the facts provided seem to stipulate that the separately invoiced charges are part of the sales price of the tangible personal property transferred, the point of the separate statement is to allow purchasers the option to purchase the tangible personal property with or without the purchase of the related services. Under these facts, the holding of Penske Truck Leasing v. Huddleston, 795 S.W. 2d 669 (Tenn. 1990) would stand for the proposition that the sales of services are separate and apart from the sale of tangible personal property, even though included in the same document. Whether an agreement includes divisible parts which can be enforced as separate contracts depends on the intention of the parties. The intention of the parties is to be determined by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out

its terms. Although Company A has stated its intention that the services be part of a single indivisible contract, that statement appears contrary to the other facts provided.

In addition, taxability of delivery charges is normally governed by Sales and Use Tax Rule 1320-5-1-.71 which provides in relevant part that "[f]reight, delivery, or other like transportation charges are subject to the Sales and Use Tax if title to the property being transported passes to the vendee at the destination point. Where title to the property being transported passes to the vendee at the point of origin, the freight or other transportation charges are not subject to the Sales or Use Tax." Under the facts as provided it appears that delivery charges would not be considered a part of the selling price of the tangible personal property transferred.

Assuming that the separately invoiced charges would be considered part of the sales price of the tangible personal property transferred, then such sales price would not be subject to sales or use tax if the tangible personal property is sold for resale in compliance with T.C.A. Section 67-6-102 (23) (A) and Sale and Use Tax Rule 1320-5-1-.68.

Assuming to the contrary that all of the separately invoiced charges are separate sales and not a part of the sales price of the tangible personal property transferred, then sales tax would still not apply to the charges at issue since the services described are not in and of themselves subject to the sales tax when not sold as part of the sales price of tangible personal property. See, T.C.A. Section 67-6-102(F).

Therefore, whether part of the sales price of tangible personal property or not, the services described would not be subject tosales or use tax under these facts.

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APPROVED: Ruth E. Johnson, Commissioner

DATE: 3/4/96